U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 04Nov2002

CASE NO. 2002-LHC-485

OWCP NO.: 08-119681

IN THE MATTER OF

KENNETH R. DEAN,
Claimant

v.

ORANGE SHIPBUILDING, CO., INC.,
Employer

ZURICH AMERICAN INSURANCE CO.,
c/o Management Services, USA
Carrier

APPEARANCES:

Bob Wortham, Esq.
On behalf of Claimant

Patrick O'Keefe, Esq.
Scott Hymel, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, brought by Kenneth Dean (Claimant) against Orange Shipbuilding Co. (Employer), and Zurich American Insurance Co. (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on July 22, 2002, in Beaumont, Texas.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced twelve exhibits, which were admitted, including: various Department of Labor filings; medical records from CHRISTUS Medical Group and Beaumont Bone and Joint Clinic (Dr. Curtis Thorpe); high school education information from Orangefield ISD; Employer's discovery responses; a drug prescription sheet; the deposition of Dr. Curtis Thorpe; photographs of Claimant's residence; the deposition of Posie Clinton; and surveillance video of Claimant.[1] Employer introduced nineteen exhibits, which were admitted, including: various Department of Labor filings; Claimant's payroll, personnel and time card records; medical records of Drs. Servet Satir, Curtis Thorpe, and John A. King; a lumbar x-ray and MRI reports; a surveillance report of Posie Clinton; Honda 350 ATV specifications and safety verification; Claimant's employment contract with Read, Morgan & Quinn, Inc.; and the depositions of Drs. Curtis D. Thorpe, Posie Clinton, and Claimant. Post-hearing, the parties submitted the depositions of James Bryan Marquardt, Charlie Bishop Tumlinson, Sr., Ronnie Lee McKay, Clay W. Hartsfield, and Shane Alfred. Claimant also submitted an affidavit of Ms. Dean.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. The Claimant was employed by Employer on all the relevant dates;

2. Employer filed a Notice of Controversion on April 23, 2001; and

3. An informal conference was held on October 12, 2001.

II. ISSUES

The following unresolved issues were presented by the parties:

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[1] References to the transcript and exhibits are as follows: Trial transcript- Tr.__; Claimant's exhibits- CX-__, p.__; Employer exhibits- EX-__, p.__; Administrative Law Judge exhibits- ALJX-__; p.___.

1. Fact and date of accident;

2. Extent of Claimant's disability; and

3. Interest, penalties, and attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant attended the special education program at Orangefield ISD High School, graduating in 1998 ranked 105th out of 116 students. (CX 6, p. 1). Because he was in learning disabilities classes, he was exempted from the State of Texas Assessment of Academic Skills, which is a test required by the State of Texas to graduate high school. *Id*. at 3. On July 23, 1998, Employer hired Claimant at $7.50 per hour as a helper. (EX 5, p. 1). Claimant quit on October 21, 1998, to work for another company. *Id*. at 17. Claimant was rehired on October 27, 1998 as a helper, quit at an unspecified time, and rehired again on June 5, 2000, still at $7.50 per hour. *Id*. at 1. On July 20, 2000, Claimant received a promotion to a welder's apprentice and received $8.50 per hour. *Id*. at 29. On January 1, 2001, Claimant's pay increased to $9.00 per hour due to a pay scale change. *Id*. at 32. Claimant testified that his job as a helper entailed fitting and tacking and he related that he did not have any trouble performing his job. (Tr. 47-48). He worked a ten hour day and often worked six days a week. (Tr. 48).

On December 8, 2000, Claimant alleged he suffered a workplace accident injuring his lower back by carrying a "mig" machine and pulling a cable. (EX 5, p. 6). Claimant alleged that he was treated by Employer's physician, Dr. Satir, but no medical records support this statement. (Tr. 53, 109-10). On January 5, 2001, Claimant reported a second workplace accident to Employer's physician, Dr. Satir. (CX 3, p. 2). Claimant related that he was lifting heavy plates on January 4, 2001, felt pain, and subsequently he was unable to sleep. *Id*. Frontal and lateral views of Claimant's lumbar spine taken on January 5, 2001, revealed a straightened lumbar curvature with no disc space narrowing or spondylolysis. *Id*. at 1. Claimant's assessment was sacroilliac pain and L5 strain. *Id*.

On January 8, 2001, Claimant returned to Dr. Satir, complained of back pain, and requested a release to return to full work duty, which Dr. Satir granted. (EX 7, p. 1). Claimant's lumbosacral range of motion was intact and improved, but he still had mild tenderness over the superior aspect of his sacroilliac joint. (CX 3, p. 3). On January 9, 2001, Claimant reported to Dr. Satir again and denied any numbness or tingling in his legs. *Id*. at 4. Rather, his pain was isolated to his back and the pain increased with motion. *Id*. In early February 2001, Claimant pain symptoms increased, and he reported to Employer that he had suffered a workplace accident on December 8, 2000. (EX 5, p. 6). Employer merely reported that Claimant hurt his low back while carrying a "mig" machine and pulling the cable but the cause of the accident was unknown. *Id*. On February 9, 2001, Claimant

returned to see Dr. Satir complaining of persistent pain from L3-L5. (CX 3, p. 5). Claimant did not think that his back had time to heal, but he could not afford to miss any work. *Id*. Dr. Satir assessed lumbosacral strain, lumbosacral pain, and scheduled an MRI, but Claimant refused an offer of light duty work. *Id*.

The February 15, 2001 MRI of Claimant's lumbar spine revealed that Claimant had a moderate disc bulge at L4-5 and a mild disc bulge at L5-S1. (CX 3, p. 8). Claimant reported to the physician administering the MRI that he had suffered a lifting accident five months earlier. *Id*. On February 28, 2001, Dr. Satir restricted Claimant to light duty beginning on March 1, 2001. *Id*. at 9.

In March 2001, Carrier hired Mr. Clinton, a private investigator, to conduct a short two or three day investigation of Claimant's activities in relation to a possible back injury. (EX 18, p. 30-32, 43). On approximately 1:15 p.m., on March 18, 2001, Mr. Clinton witnessed Claimant exit his home, enter a shed, and exit riding a four-wheeler. *Id*. at 49-51, 54. Mr. Clinton testified that Claimant would "gun" the four-wheeler, move at a great speed, slow down quickly and fishtail. (EX 18, p. 64). The terrain was muddy, and Claimant made doughnut shapes on the ground and jumped his ATV over natural ditches on his property. *Id*. at 64-71. Mr. Clinton never observed all the wheels of the ATV leave the ground, but he did recall the front wheels leaving the ground by about three inches. *Id*. at 109. Mr. Clinton observed Claimant standing on the foot-pegs, bending at the waist, crouching, and leaning when he turned the ATV. *Id*. at 134-36. At no time did Mr. Clinton hear groans, complaint's or witness any physical favoring. *Id*. at 138-39. Accepting a ride from Claimant to "view some property for sale," Claimant drove Mr. Clinton through the woods on his ATV. *Id*. at 80. At one point during the ride, the ATV became stuck, and Claimant physically moved it by pulling the four wheeler backwards. *Id*. at 77-78.

On April 3, 2001, Dr. King, an orthopedic surgeon, wrote to Dr. Satir that Claimant injured himself while picking up a welding machine on May 31, 2000, and sustained severe bilateral radiculopathy in his lower extremities. (CX 3, p. 10). Dr. King assessed intervertebral disc disease of the lumbar spine with myelopathy and he planned to do a steroid block. *Id*. at 11. On April 6, 2001, Claimant informed his supervisor that his back was sore from working on his truck. (EX 5, p. 40). Claimant never received any of Dr. Kings recommended treatment, and on April 23, 2001, Claimant received a three day suspension for missing ten days and having twenty-one partial absences. *Id*. at 36. On April 27, 2001, Employer fired Claimant for insurance fraud. *Id*. at 2, 5.

Seeking medical treatment for his back on his own, Claimant scheduled an appointment to see Dr. Thorpe, an orthopedist, on May 8, 2001. (CX 5, p. 1). Claimant related to Dr. Thorpe that he suffered a workplace injury on December 8, 2000, while lifting and carrying a one-hundred pound welding machine. (CX 5, p. 1; EX 17, p. 24). Reviewing x-rays of Claimant's lumbar spine, Dr. Thorpe interpreted a minor amount of facet sclerosis in the lower lumbar segments, and the February 15, 2000 MRI revealed disc space narrowing at L4-5 and L5-S1 producing a bulging disc. (CX 5, p. 2). Dr. Thorpe also opined that Claimant's canal size was narrow, but his foramen remained intact. *Id*. Dr. Thorpe's impression was discogenic back disease and he opined that Claimant was not a

surgical candidate, but Claimant should undergo a short course of physical therapy with a work hardening or strength and conditioning program. *Id*. If that course of action failed, Dr. Thorpe opined that Claimant would undergo a trial of epidural steroid injections or facet blocks to save his functional restoration. *Id*.

On June 26, 2001, Dr. Thorpe opined that at the time of Claimant's visit, Claimant was disabled from any job that required him to do heavy lifting on a regular basis. (CX 5, p. 5). Claimant's lifting should be limited to no more than forty pounds on a regular basis, but this limit could increase if Claimant underwent a work hardening program or epidural steroid injection. *Id*. This disability began on the date of Claimant's accident and is continuing. *Id*. Dr. Thorpe did not release Claimant for light duty because he was not Clamant's treating physician and had only been asked to perform an assessment. (EX 17, p. 12-13). When Dr. Thorpe restricted Claimant to lifting forty pounds on a regular basis he meant that Claimant should not lift over forty pounds three times a day, and although Claimant could probably lift that amount ten times a day, he would be at a greater risk for inflaming his back. (CX 10, p. 30-31). Claimant could pick up a thirty-five to forty pound welding machine at work as long as he did not do it on an everyday basis. *Id*. at 32.

Ms. Dean tried to secure additional medical treatment for Claimant's back, but without insurance or workers' compensation benefits, the only place Claimant could receive medical treatment was at the free clinic at UTMB Hospital. (Tr. 193). Around January 25, 2002, a physician at UTMB conducted an x-ray examination and prescribed a regimen of physical therapy. (Tr. 193). The physical therapy did not help, and Claimant returned around February 22, 2002 for a steroid shot. (Tr. 194). After the steroid shot did not help, a UTMB physician ordered a new MRI examination, but the appointment was not until August or September 2002, after the formal hearing in this matter. (Tr. 195-96).

B. Claimant's Testimony

Claimant testified that his job as a helper in employer's facility entailed fitting and tacking and he related that he did not have any trouble performing his job. (Tr. 47-48). He worked a ten hour day and often worked six days a week. (Tr. 48). Claimant testified that the first time he was injured was December 8, 2000, relating that he was carrying a welding machine, hurt his back, informed his supervisor James Hand, and on the following day went to see Dr. Satir. (Tr. 49, 53, 109-10). Claimant testified that he was suffering from low back pains and a moving numbness in both legs. (Tr. 115). Nonetheless, the only work Claimant missed was for his December 8, 2000 injury was traveling to and from the doctor's office. (Tr. 54).

On January 4, 2001, Claimant's back began to hurt again. Claimant informed his supervisor, Charlie Tumlinson, and Employer made arrangements for Claimant to see Dr. Satir. (Tr. 54-55, 150-53, 177). Claimant explained to Dr. Satir that he was having back problems after lifting heavy plates. (Tr. 57). On January 8, 2001, Claimant returned and requested that Dr. Satir release him for full duty work even though he was still hurting because he was a new father and needed to work to support

his family. (Tr. 57).

On February 9, 2001, Claimant felt he needed to return to Dr. Satir due to lower back pains that made it difficult for him to sit. (Tr. 58). Claimant had no explanation as to why the physician administering his February 15, 2001 MRI reported that Claimant had a lifting accident about five months prior to the exam. (Tr. 128). Claimant did not recall having any other injury prior to December 8, 2000. (Tr. 129-30). Claimant related that after Dr. Satir assigned him light duty work on March 1, 2001, Employer assigned Claimant gate duty, tool room duty, minor welding, and Claimant stated that he continued to have back problems which were aggravated by sitting in a chair, standing, and bending down. (Tr. 61). Claimant requested to see a bone and joint specialist, Dr. Clark, but Employer denied that request. (Tr. 61-62). Instead, Employer made an appointment for Claimant to see Dr. King. (Tr. 62).

While in Dr. King's office, Claimant did not remember the date on which he was first injured so he called Dr. Satir's office to ascertain the day of his first visit. (Tr. 62). A secretary told Claimant that his first visit was on May 31, 2000, thus, Claimant put that date down as the date of his accident. (Tr. 62). Claimant was willing to undergo Dr. King's recommended treatment of a steroid shot, but he never underwent that procedure. (Tr. 63-64). Following his visit with Dr. King, Claimant testified that he was still having a little back pain and tingling sensations in his legs with an inability to squat or bend over. (Tr. 66).

To control his pain symptoms, Claimant testified that he took two Vicodin a day, and two Motrin a day for muscle spasms. (Tr. 69). When Claimant came home from work, he laid on the hardwood floor, and he had difficulty sleeping in bed, so he would sleep on the floor as well. (Tr. 70-71). Employer gave Claimant three days off of work, and when he came back, Employer fired him for insurance fraud. (Tr. 71). After his termination, Claimant continued to seek medical treatment, and eventually was able to obtain an appointment with Dr. Thorpe. (Tr. 71-72). Claimant next presented to Dr. Parmonus, but Dr. Parmonus directed Claimant to University of Texas Medical Branch (UTMB) because Claimant's back was too bad and UTMB had a free clinic. (Tr. 73). In March 2002, Claimant went to UTMB, presented to the ER and waited seven hours to obtain an appointment. (Tr. 73-74). A UTMB physician gave Claimant a prescription for physical therapy, and Claimant testified that he followed this regime at home but it did not help his pain symptoms. (Tr. 75). Claimant later returned to UTMB and received a steroid shot but that did not help is pain either. (Tr. 75). On his third visit, a physician at UTMB ordered an MRI, but Claimant was not aware of those results. (Tr. 76). Claimant testified that he did not think he could return to his former employment and work full duty. (Tr. 86).

Regarding Claimant's encounter with the investigator, Posie Clinton, Claimant acknowledged that he gave Mr. Clinton a ride on his ATV to see some adjoining property that was for sale. (Tr. 82). Claimant denied that he ever drove his ATV in a reckless manner, denied driving through ditches, and denied getting stuck in the mud. (Tr. 82). Claimant never took Mr. Clinton behind his house because the land behind his house was not for sale. (Tr. 82-83). Claimant stated that his ATV was not fast, was not designed for jumping and racing, and he had never jumped his ATV because it was too heavy. (Tr. 83). Claimant had placed "Super Swamper" tires on his ATV, which are

designed for wet and muddy conditions. (Tr. 84). Regarding Mr. Clinton's videotape, Claimant testified that his only reason for riding the ATV was to remove it from his small tool shed so that he could have better access to tools he needed to install new lights on his truck. (Tr. 85-86). He used a stool to step on and off the bed of his vehicle. (Tr. 86).

Claimant testified that he had changed his testimony that he gave in his earlier deposition because he was "totally confused." (Tr. 88-89). Claimant totally denied that he was ever injured at work in May 2000, and related that the information he provided to Dr. King about a May 2000 accident was all a misunderstanding. (Tr. 96-97, 101). Rather, the correct version of his injury was that he hurt his lower back lifting a welding machine and later aggravated it by lifting plates. (Tr. 103).

C. Testimony of Penny Dean

Ms. Dean, the spouse of Claimant, testified that Claimant told her that he was injured on December 8, 2000. (Tr. 187). Claimant took medication following his December injury and was able to work without much problem, but in January 2001, Claimant returned home from work complaining about back and leg pains. (Tr. 188). Ms. Dean was not present when Claimant presented to Dr. Satir, but she accompanied Claimant to see Dr. King, and related that she did not think to correct Claimant's statement that he was injured in May when Ms. Dean knew that the date was December. (Tr. 211). Ms. Dean also accompanied Claimant to see Dr. Thorpe, and she spoke with Claimant about getting his story straight, but Claimant asserted that he had things under control. (Tr. 214).

Ms. Dean tried to secure medical treatment for Claimant's back, but without insurance or workers' compensation benefits, the only place Claimant could receive medical treatment was UTMB Hospital. (Tr. 193). Around January 25, 2002, a physician at UTMB conducted an x-ray examination and prescribed a regimen of physical therapy. (Tr. 193). The physical therapy did not help, and Claimant returned around February 22, 2002 for a steroid shot. (Tr. 194). After the steroid shot did not help, a UTMB physician ordered a new MRI examination, but the appointment was not until August or September 2002. (Tr. 195-96).

Claimant's workplace injury adversely affected his habits of daily living in that Ms. Dean had to perform yard work, take out the garbage, and upkeep the house because any activity Claimant performed caused him pain. (Tr. 205). Claimant and Ms. Dean used to take vacations to go skiing, camping, and canoeing, but that activity stopped because Claimant could not sit still very long. (Tr. 205).

Ms. Dean testified that Claimant did not explain himself well, and whenever he was nervous, frustrated, or angry his communication skills deteriorated. (Tr. 189). Ms. Dean had read Claimant's deposition and she knew that the majority of it was incorrect. (Tr. 190).

Ms. Dean remembered the day that Claimant gave Posie Clinton a ride on his ATV. (Tr. 196). Claimant did not take Mr. Clinton behind his house, and Ms. Dean testified that Claimant was not riding in a reckless fashion. (Tr. 197). Claimant had not been on any ATV trips with his friends since the December 8, 2000 accident, and Claimant had never injured himself on an ATV. (Tr. 198, 204). In a post hearing affidavit, Ms. Dean swore that Claimant had not ever ridden his ATV with his friend Mr. Hartsfield after the birth of their daughter on October 31, 2000. (CX 16, p. 2).

D. Exhibits

(1) Claimant's High School Records

Claimant attended the special education program at Orangefield ISD High School. (CX 6, p. 1). In the State of Texas Assessment of Academic Skills, Claimant was exempted from testing. *Id*. at 3. Claimant graduated high school in 1998 ranked 105th out of 116 students.

(2) Claimant's Personnel Records

On July 23, 1998, Employer hired Claimant at $7.50 per hour as a helper. (EX 5, p. 1). Claimant quit on October 21, 1998, to work for another company. *Id*. at 17. Claimant was rehired on October 27, 1998 as a helper, quit at an unspecified time, and rehired again on June 5, 2000, still at $7.50 per hour. *Id*. at 1. On July 20, 2000, Claimant received a promotion to a welder's apprentice and received $8.50 per hour. *Id*. at 29. On January 1, 2001, Claimant's pay increased to $9.00 per hour due to a pay scale change. *Id*. at 32.

On December 8, 2000, Claimant reported lower back pain while carrying a "mig" machine and pulling a cable. (EX 5, p. 6). Employer did not fill out an accident investigation report until February 8, 2000.[2] *Id*. April 6, 2001, Claimant informed his supervisor that his back was sore from working on his truck. (EX 5, p. 40). On April 23, 2001, Claimant received a three day suspension for missing ten days and having twenty-one partial absences. *Id*. at 36. On April 27, 2001, Employer fired Claimant for insurance fraud. *Id*. at 2, 5.

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[2] Considering that Claimant's hire date on the Accident Investigation Report was June 5, 2000, and the reported injury was February 8, 2000, I find that the Accident Report contains a typo and that the date the form was completed should read 2/08/01 and not "2/08/00." (EX 5, p. 6). In this regard I note that Mr. McKay, who filled out the accident report, originally testified that the year was incorrect and the year should be 2001, not 2000. (EX 21, p. 8). Only on further questioning by counsel did Mr. McKay state that the month was wrong, and the date should read 12/08/00 not "2/8/00." *Id*. at 8-9. Based on the circumstances of the case, and the record as a whole, I find that the date should read February 8, 2001, because there are no physician reports substantiating that Claimant was injured on December 8, 2000, and Claimant had requested from Employer that he return to see the company physician on February 9, 2001. (CX 3, p. 5).

(3) Medical Records of the CHRISTUS Medical Group and Dr. Servet Satir

On January 5, 2001, Claimant reported to the CHRISTUS Medical Group that he was lifting heavy plates on January 4, 2001, felt pain, and subsequently he was unable to sleep. (CX 3, p. 2). Frontal and lateral views of Claimant's lumbar spine taken on January 5, 2001, revealed a straightened lumbar curvature with no disc space narrowing or spondylolysis. *Id*. at 1. Claimant's assessment was sacroilliac pain and L5 strain. *Id*.

On January 8, 2001, Claimant returned, complained of back pain, and requested a release to return to full work duty, which Dr. Satir granted. (EX 7, p. 1). Claimant's lumbosacral range of motion was intact and improved, but he still had mild tenderness over the superior aspect of his sacroilliac joint. (CX 3, p. 3). Dr. Satir acquiesced in Claimant's request to return to full duty. *Id*. at 5. The following day, Claimant reported to Dr. Satir again and denied any numbness or tingling in his legs. *Id*. at 4. Rather, his pain was isolated to his back and the pain increased with motion. *Id*. On February 9, 2001, Claimant returned to see Dr. Satir complaining of persistent pain from L3-L5. *Id*. at 5. Claimant did not think that his back had time to heal, but he could not afford to miss any work. *Id*. Dr. Satir assessed lumbosacral strain, lumbosacral pain, and scheduled an MRI, but Claimant refused an offer of light duty work. *Id*.

A February 15, 2001 MRI of Claimant's lumbar spine revealed that Claimant had a moderate disc bulge at L4-5 and a mild disc bulge at L5-S1. (CX 3, p. 8). The physician preparing the MRI reported a history of a lifting accident that occurred five months prior to the test. *Id*. On February 28, 2001, Dr. Satir restricted Claimant to light duty beginning on March 1, 2001. *Id*. at 9.

(4) Medical Report of John A. King

On April 3, 2001, Dr. King, an orthopedic surgeon, wrote to Dr. Satir that Claimant injured himself while picking up a welding machine on May 31, 2000, and sustained severe bilateral radiculopathy in his lower extremities. (CX 3, p. 10). Dr. King assessed intervertebral disc disease of the lumbar spine with myelopathy and he planned to do a steroid block. *Id*. at 11.

(5) Medical Records & Deposition of Dr. Curtis D. Thorpe

On May 8, 2001, Dr. Thorpe, an orthopedist, examined Claimant and reviewed his MRI. (CX 5, p. 1). Claimant related to Dr. Thorpe that he suffered a workplace injury on December 8, 2000, while lifting and carrying a one-hundred pound welding machine. (CX 5, p. 1; EX 17, p. 24). Dr. Thorpe related that after Claimant's February 15, 2001 MRI scan, he worked light duty until he was dismissed in April 2000. (CX 5, p. 1). Reviewing x-rays of Claimant's lumbar spine, Dr. Thorpe interpreted a minor amount of facet sclerosis in the lower lumbar segments, and the February 15, 2000 MRI revealed disc space narrowing at L4-5 and L5-S1 producing a bulging disc. *Id*. at 2. Dr. Thorpe also opined that Claimant's canal size was narrow, but his foramen remained intact. *Id*. Dr.

Thorpe's impression was discogenic back disease and he opined that Claimant was not a surgical candidate, but Claimant should undergo a short course of physical therapy with a work hardening or strength and conditioning program. *Id*. If that course of action failed, Dr. Thorpe opined that Claimant would undergo a trial of epidural steroid injections or facet blocks to save his functional restoration. *Id*.

On June 26, 2001, Dr. Thorpe opined that at the time of Claimant's visit, Claimant was disabled from any job that required him to do heavy lifting on a regular basis. (CX 5, p. 5). Claimant's lifting should be limited to no more than forty pounds on a regular basis, but this limit could increase of Claimant underwent a work hardening program or epidural steroid injection. *Id*. This disability began on the date of Claimant's accident is continuing. *Id*. Dr. Thorpe did not release Claimant for light duty because he was not Clamant's treating physician and had only been asked to perform an assessment. (EX 17, p. 12-13). When Dr. Thorpe restricted Claimant to lifting forty pounds on a regular basis he meant that Claimant should not lift over forty pounds three times a day, and although Claimant could probably lift that amount ten times a day, he would be at a greater risk for inflaming his back. (CX 10, p. 30-31). Claimant could pick up a thirty-five to forty pound welding machine at work as long as he did not do it on an everyday basis. *Id*. at 32.

The parties noticed Dr. Thorpe's deposition on July 10, 2002. (EX 17, p. 1). Dr. Thorpe testified that Claimant's discogenic back disease was a permanent condition.[3] *Id*. at 12. The fact that Claimant had not received any additional medical treatment could perpetuate Claimant's injury and create a greater disability that Claimant would have sustained with treatment. *Id*. at 14.

The fact that Claimant testified that the welding machine that Dr. Thorpe reported weighing one hundred pounds only weighed thirty-five pounds did not change Dr. Thorpe's assessment because Claimant could still have the same problems lifting thirty-five pounds. (EX 17, p. 30). Dr. Thorpe related that riding an ATV could possibly cause lumbar sprains. *Id*. at 42-43. Dr. Thorpe though it was important to know how many times Claimant had sustained low back problems/injuries to better inform his medical analysis and diagnosis. *Id*. at 45.

Dr. Thorpe explained that Claimant's bulging disc was not the same as a disc herniation because a herniation was a much larger bulging of a disc. (EX 17, p. 52). Disc rupture and disc protrusion are also different terms used to describe different levels of disc bulging. *Id*. Claimant's disc bulge was not impinging on any nerve root, but that did not mean that Claimant could not have anatomical leg pain because there does not have to be any mechanical compromise to inflame the nerve root. *Id*. at 53. Claimant complained that his left leg was hurting him, and Dr. Thorpe explained that it was possible, but not plausible, that even with no mechanical pressure on the nerve, Claimant could suffer from dermatomal type irritation of his nerve. *Id*. at 56. Regarding Claimant's

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[3] Dr. Thorpe testified that discogenic back disease was very similar to degenerative back disease. (EX 17, p. 20). Degenerative disc disease is not congenital, but it can be developmental. *Id*. at 51. In a patient as young as Claimant, degenerative disc disease was not unheard of, but it was not common. *Id*.

reports of right arm numbness resulting from his injury, Dr. Thorpe stated that it was physiologically unexplainable based on Claimant's injury. *Id*. at 57-58.

A lifting accident, even in light of other possible etiologies of Claimant's back pain, could cause or exasperate a degenerative disc disease problem. (EX 17, p. 60-61). The bulging disc in Claimant's back could have been present for years prior to his February 15, 2001 MRI. *Id*. at 61. Claimant's inconsistent injury statements to physicians and activities that Claimant undertook but did not relate to Dr. Thorpe gave Dr. Thorpe concern that other parts of Claimant's subjective complaints might be inaccurate. *Id*. at 73-74. Claimants' MRI, while it cannot describe pain, gave no explanation as to why Claimant suffered from leg pain. *Id*. at 74. Based on Claimant's history and MRI scan, however, Dr. Thorpe opined that Claimant had received an injury and that his original diagnosis and recommendations were still accurate, but he could not make that determination with medical certainty. *Id*. at 83, 105, 120.

(6) Investigative Report and Deposition Testimony of Posie Manuel Clinton IV

Mr. Clinton, a business development manager for Barton Protective Services in Houston, Texas, began working for that employer in November 2001. (EX 18, p. 5). Prior to working for Barton Protective Services, Mr. Clinton worked for Clyde Wilson International Investigations and P.M.Clinton International Investigations, and had undertaken work from both plaintiff and defense attorneys. *Id*. at 7-15. When Claimant worked for P.M.Clinton International Investigations, he worked for his father. *Id*. at 19. Mr. Clinton's license to be a private investigator was held under his father's firm, for which he still did part-time work, and he was not sure if his license was current. *Id*. at 22-25. Apart for a subpoena service school, continuing education requirements, and family connections, Mr. Clinton never had any formal investigatory training. *Id*. at 38-41.

In March 2001, Mr. Clinton was hired by Carrier to conduct a short two or three day investigation of Claimant's activities in relation to a possible back injury. (EX 18, p. 30-32, 43). Mr. Clinton was also working as many as four other cases in the Beaumont area, and he went by Claimant's house on March 17-18, 2001. *Id*. at 34-36. The first day, Mr. Clinton did not observe any activity, but when he returned on March 18, 2001, he noticed that Claimant was home so he set up surveillance. *Id*. at 49. At approximately 1:15 p.m., Claimant exited his home, entered a shed, and exited riding a four-wheeler around his yard and across the street. *Id*. at 50-51, 54. The videotape depicting Claimant's activities presented to Claimant and the Court, however, does not have all the time Claimant actually spent on the four-wheeler, it only contains about five seconds of riding activity. *Id*. at 55. Mr. Clinton's office sent the original tape to Employer/Carrier's attorney's office where the original tape was lost. *Id*. at 55. In making over one-hundred videotapes, this was the only time Mr. Clinton had ever known a portion of a videotape to be missing. *Id*. at 61-62. Only the very beginning and the very end of his surveillance are depicted. *Id*. at 102.

Mr. Clinton testified that Claimant would "gun" the four-wheeler, move at a great speed, slow down quickly and fishtail. (EX 18, p. 64). The terrain was muddy, and Claimant made doughnut shapes on the ground. *Id*. at 64-65. Claimant also used a ditch as a ramp to jump his four-wheeler.

Id. at 65-66. Mr. Clinton estimated that the ditch was probably eight to nine feet from bank to bank and two feet deep. *Id*. at 67. Mr. Clinton observed Claimant go through the ditch three or four times, located no more than ten to forty feet from his observation vehicle. *Id*. at 71. Mr. Clinton never observed all the wheels of the ATV leave the ground, but he did recall the front wheels leaving the ground by about three inches. *Id*. at 109. Mr. Clinton observed Claimant standing on the foot-pegs, bending at the waist, crouching, and leaning when he turned the ATV. *Id*. at 134-36. At no time did Mr. Clinton hear groans, complaint's or witness any physical favoring. *Id*. at 138-39.

Claimant lived in a rural area, and Mr. Clinton's vehicle was the only auto parked on the road. (EX 18, p. 79). Curious, Claimant rode his four wheeler past Mr. Clinton several times and then stopped to ask Mr. Clinton if he needed something and to see what he was doing on the road. *Id*. Mr. Clinton replied that he was waiting for a real estate agent to view some property. *Id*. at 80. Mr. Clinton explained the video camera by stating that his wife was in Houston, pregnant, and he was videotaping the property to show her. *Id*. at 80-81. Claimant offered to show the property to him on the back of his four-wheeler, and Mr. Clinton accepted the invitation. *Id*. The ride lasted about 30-35 minutes. *Id*. at 70. At one point, the four wheeler became stuck, and Claimant physically moved it by pulling the four wheeler backwards. *Id*. at 77-78. In conversing with Claimant about the land, Claimant left the impression on Mr. Clinton that he was a clean-cut, nice guy, without any intellectual defects. *Id*. at 97.

(7) Deposition Testimony of Shane Alfred

Mr. Alfred's deposition was noticed post-hearing on August 14, 2002. (EX 20, p. 1). Mr. Alfred served as the director of human resources for Employer and was acquainted with Claimant. *Id*. at 5-6. On July 7, 2000, Claimant passed a proficiency examination on forklift operation, missing only two of twelve questions. (EX 5, p. 30-31). Mr. Alfred testified that Claimant received a passing grade, his score was average, and there was nothing to suggest that Claimant was slow-witted, unable to concentrate, or easily confused. (EX 20, p. 7-8).

Mr. Alfred testified that Employer investigated all reported accidents. (EX 20, p. 8). To his knowledge, Mr. Alfred was unaware of any accident report filled out on January 4, 2001, and Mr. Alfred had not received any medical invoices from the company doctor, Dr. Satir, from December 8, 2000. *Id*. at 10. Furthermore, if Claimant had wished to see Dr. Satir on December 9, 2000, he would have been unsuccessful because December 9, 2000 was a Saturday and the company doctor was only open for business Monday through Friday. *Id*. at 11. Mr. Alfred did receive a bill from Dr. Satir for Claimant's January 5, 2001 office visit, and he received Dr. Satir's January 5, 2001 report whereby Claimant complained he was injured lifting heavy plates the day before. *Id*. at 14-15, 24. Additionally, Mr. Alfred opined that Claimant's attendance records did not reflect any significant change either before or after his accident. *Id*. at 13-14.

Mr. Alfred had no idea why Claimant requested light duty work beginning on March 1, 2001, because Claimant had not made any report to Employer that he suffered from an accident at the

shipyard. (EX 20, p. 19-20). Mr. Alfred was unaware that Claimant alleged that he was injured at work on January 4, 2001, but he was aware that Claimant had reported an accident on December 8, 2000. *Id*. at 22. Mr. Alfred testified that no investigation was performed in relation to the history Claimant gave to Dr. Satir on January 5, 2001, or the history he gave on his February 15, 2001 MRI because Employer has a policy that employees report their accidents. *Id*. at 43-46. The history Claimant related to Dr. King, of a back injury on May 31, 2000, occurred before Claimant even began to work for Employer on June 5, 2000. *Id*. at 48.

Employer did not originate the idea that Claimant had committed insurance fraud. (EX 20, p. 39). Rather, that determination was made by an investigator, Posie Clinton, and Ms. Judice, who worked in the claims department, but Mr. Alfred made the decision to terminate Claimant's employment. *Id*. at 39, 41. Mr. Alfred understood Claimant's fraud to be working on light duty while undertaking recreational activities like working on trucks. *Id*. at 40.

(8) Deposition of Ronnie Lee McKay

Mr. McKay's deposition was noticed post-hearing on August 14, 2002. (EX 21, p. 1). Mr. McKay was the yard superintendent - the head of production to whom supervisors report - at Employer's facility. *Id*. at 5. Mr. McKay was familiar with Claimant and Claimant's report of an accident on December 8, 2000 was brought to his attention. *Id*. at 6. Mr. McKay first stated that the accident report was not completed the same day as the accident, but completed on February 8, 2000, because Claimant did not report the injury until that time. *Id*. at 7. Realizing that he could not fill out a report ten months prior to the accident, Mr. McKay explained that the year should read 2001. *Id*. at 8. On further examination by Employer's counsel, Mr. McKay agreed that his typographical error concerned the month, and that the month the report was completed should read "12" and not "2." *Id*. at 8-9. Mr. McKay did not remember Claimant asking to see a doctor over his injury. *Id*. at 9.

Judging Claimant as a worker, Mr. McKay stated that Claimant did not strike him as inattentive, confused, or a poor performer. (EX 21, p. 11). When Claimant reported the injury to Mr. Vance, his first line supervisor, Mr. Vance brought Claimant to Mr. McKay's office. *Id*. at 13. Mr. McKay did not have any independent recollection of the meeting other than what he stated in his report. *Id*. at 14.

Regarding his April 6, 2001 e-mail to Joyce Blanchette relating that Claimant's back was sore from working on his truck, Mr. McKay testified that the information likely came from Claimant's supervisor. (EX 21, p. 19-20). Mr. McKay did remember that in February or March 2001, Claimant came to work and had another employee help him put a bumper on his truck. *Id*. at 23. Mr. McKay only witnessed Claimant and the other employee lift the bumper out of Claimant's truck and place it on the ground before he attended to other business. *Id*. at 27. Mr. McKay was not sure if the incident where Claimant alleged to have hurt his back while working on his truck was the same instance that Mr. McKay saw Claimant pick the bumper out of the back of his truck. *Id*. at 31.

(9) Deposition of Charlie Bishop Tumlinson, Sr.

Employer noticed the deposition of Mr. Tumlinson, post-hearing, on August 14, 2002. (EX 22, p. 1). During the year 2000, or 2001, Mr. Tumlinson, who had been working as a "lead man" since 1994, was was promoted to a supervisor's position in charge of fitters, welders, and helpers. *Id*. at 6, 11. Mr. Tumlinson's position change was in name only because he continued to do the same work as before his promotion. *Id*. at 12. Claimant worked under the supervision of Mr. Tumlinson, but on January 4, 2001, Mr. Tumlinson was not working with Claimant and Claimant never reported an injury to him. *Id*. at 7. Mr. Tumlinson also reported that Claimant was not working for him on December 8, 2000, and he never reported any injuries. *Id*. at 8. Donnie Vance was also a "lead man" and Claimant could have reported an injury to him. *Id*. at 16.

(10) Deposition of Clay W. Hartsfield

Employer noticed the deposition of Mr. Hartsfield, post-hearing, on August 14, 2002. (EX 23, p. 1). For the past year and a-half, Mr. Hartsfield served as the maintenance foreman, promoted from a "regular maintenance" position, and before that he was the "wilobrater operator." *Id*. at 5. During the winter of 2000-01, Mr. Hartsfield worked around Claimant and came to know him socially. *Id*. at 6. In the spring of 2001, Claimant asked Mr. Hartsfield to help him install a bumper on his truck in Employer's shop yard. *Id*. at 6-7. The bumper was constructed from pure iron and its weight required two people to lift it. *Id*. at 7-8. After removing the bumper from the back of Claimant's truck, Mr. Hartsfield took an overhead crane to lift the bumper into the right position. *Id*. at 9. Mr. Hartsfield did most of the work, but Claimant gave some assistance. *Id*. at 10. Claimant never complained to Mr. Hartsfield about his back. *Id*. at 11.

In the spring of 2001, Clamant related to Mr. Hartsfield that he had some problems with his truck in that his wheel-bearings were defective. (EX 23, p. 12). When Mr. Hartsfield arrived at Claimant's house to help him inspect the wheel-bearings, Claimant had already removed his aftermarket thirty-three inch Baja Claw tire. *Id*. at 13. The tire and rim weighed approximately one-hundred pounds. *Id*. at 15. Claimant had also attempted to loosen the spindle, but was unsuccessful. *Id*. at 16. Mr. Hartsfield also attempted to wrench the spindle loose but he was without success. *Id*. On prior occasions, Claimant had changed all four thirty-three inch Baja Claw tires and reinstalled his original equipment because the larger tires damaged his transmission. *Id*. at 17-18. Claimant also rotated his own tires. *Id*. at 18.

Mr. Hartsfield also testified that Claimant brought his ATV to work and did donuts on steel plates Employer had stacked in its yard. (EX 23, p. 19). Mr. Hartsfield was familiar with a local area called the Highlines, located about a mile form his house, that contained some four-foot mud-holes. *Id*. at 20. The terrain was rough, and Mr. Hartsfield testified that he and Claimant rode Claimant's ATV at the location at least eight times between December 2000 and April 2001. *Id*. at 21. In November and December 2000, he and Claimant went riding about every weekend. *Id*. at 53. On one occasion, Claimant got his ATV stuck in a mud-hole, sliced the tire on a piece of glass. *Id*. at 21-22. Mr. Hartsfield helped Claimant wiggled the ATV back and forth and reposition weight to pull the

ATV free. *Id*. Claimant never said that he had a bad back or that he was unable to move the ATV. *Id*. at 23.

Claimant's ATV reached speeds of up to 52 mph, and Mr. Hartsfield testified that Claimant routinely operated his ATV at full throttle in rough country. (EX 23, p. 25). In his experience such activity caused the driver to bounce around, but Claimant never complained about any back pain. *Id*. at 25-26. Mr. Hartsfield had not seen Claimant since he was terminated in April 2001. *Id*. a 43.

(11) Deposition and Report of James Bryan Marquardt

Employer noticed the deposition of Mr. Marquardt, post-hearing, on August 14, 2002. (EX 24, p. 1). Claimant offered Mr. Marquardt as an expert in ATVs. *Id*. at 6. Mr. Marquardt graduated high school in from Westbrook in Beaumont, Texas, and had not taken any further academic or trade school courses. *Id*. at 6-17. Mr. Marquardt's experience came from the fact that he worked for two years at an ATV dealership, Orange Motor Sports, had ridden hundreds of ATVs through all types of terrain, and had raced motorcycles since the age of twelve. *Id*. at 10-11, 21. Mr. Marquardt's business only sold new Kawasaki ATVs, but often accepted Honda models, such as Claimant's Honda Rancher, as a trade in. *Id*. at 21-22.

Mr. Marquardt spoke with Claimant for approximately twenty minutes, and learned that Claimant had put oversized tires on his ATV without raising the overall ground clearance, meaning that Claimant would have problems with his oversized tires rubbing the plastic over the wheels. (EX 24, p. 49-50). The tires Claimant installed were called "Vampire." *Id*. at 77. Mr. Marquardt agreed that Claimant's model of Honda 4x4 Rancher had a suspension system, and he explained the comment in his report that the model was not used for jumping or recreation because the 5.9 inches of travel (suspension) on Claimant's model was much less than the nine inches of travel on racing models. *Id*. at 69-70.

Touring Claimant's property, Mr. Marquardt observed four ditches. (EX 24, p. 82). Based on his experience, he stated that Claimant's ATV could jump, but it would not be able to jump the four inch ditch in front of his residence. *Id*. at 90. Although it was possible for Claimant to "fish-tail" with his oversized Vampire tires, such a feat would be difficult. *Id*. at 99. Claimant's twenty-seven inch tires were specifically designed to go through mud. *Id*. at 105. The ditch in the rear of Claimant's residence was approximately four feet deep with a seventy degree slope and Mr. Marquardt did not think Claimant's ATV could traverse the ditch. *Id*. at 109. Mr. Marquardt testified that once an ATV became stuck in a mud-hole, it took a lot of exertion to work the ATV loose. *Id*. at 115.

IV. DISCUSSION

A. Contention of the Parties

Claimant contends that he was injured in the course and scope of his employment on December 8, 200 while carrying a welding machine, sought undocumented medical treatment and returned to see the company doctor on January 5, 2001, after suffering an aggravation of his December 8, 2000 injury while lifting plates the day before. Because Claimant's back injury is related to his employment, he is entitled to authorized medical treatment. Regarding the extent of his injury, Claimant contends that Employer terminated him while on light duty, Dr. Thorpe opined that he was disabled, and Dr. Thorpe assigned lifting restrictions that negated Claimant's ability to perform his former job. Because Employer did not show any evidence of suitable alternative employment, and Claimant has not reached maximum medical improvement, Claimant is totally disabled. Finally, Claimant argues that his average weekly wage is $462.50.

Employer asserts that Claimant is not a credible witness and his spouse, Ms. Dean, attempted to do no more than support Claimant's inaccurate statements. Furthermore, Employer argues that Claimant's witness, Mr. Marquardt, cannot be accepted as an expert witness due to his modest educational background, paucity of technical training, and minimalist approach to testing an measuring the capabilities of Claimant's ATV on the terrain surrounding his home. Regarding Claimant's December 8, 2000 injury, Employer asserts that there is no evidence that Claimant sustained a compensable harm on that date. Regarding Claimant's January 4, 2001, injury, Employer asserts that it was not given proper notice under that statute and that whatever Dr. Satir's report contained relating to a work accident on January 4, 2001, was negated by Claimant's return to full duty and cannot constitute notice under the Act. Furthermore, Employer asserts that the presumption of causation only attaches to claims made under the act, and Claimant never filed a claim for the January 4, 2001 injury.

B. Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, 88 S. Ct. 1140, 20 L. Ed. 2d 30 (1968); *Louisiana Insurance Guaranty Ass's v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467, 88 S. Ct. at 1145-46; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Gilchrist v. Newport News Shipping and Dry Dock Co.*, 135 F.3d 915, 918 (4th Cir. 1998); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

I find that Claimant is an incredible witness. Claimant's inconsistent statements on the record are too numerous to count and Claimant's counsel and spouse acknowledged that Claimant had difficulty in remembering events. (Tr. 27, 189-90). Claimant himself acknowledged that he was easily confused. (Tr. 114). For example, Claimant's deposition testimony was opposite from his trial

testimony, and Claimant called his version of events in his deposition a "big misunderstanding." (Tr. 97). Claimant was unable to give a consistent date of injury to his various physicians, relating to Dr. Satir that he was injured on January 4, 2001 (CX 3, p. 2); to Dr. King that he was injured in May 2000 (CX 3, p. 10), to Dr. Thorpe and Employer that he was injured on December 8, 2000 (CX 5, p. 1; EX 1, p. 1), and to a physician administering a MRI in February 2001, that he was injured five months ago and had recently re-injured himself. (EX 15, p. 1).

Claimant testified at trial that he had reported his January 4, 2001, workplace accident to his supervisor Mr. Tumlinson. (Tr. 150-53). Mr. Tumlinson, however, denied ever receiving an injury report from Claimant. (EX 22, p. 7-8). Claimant testified that the day after his December 8, 2000 workplace accident he was treated by Dr. Satir. (Tr. 53, 109-10). Dr. Satir had no record of this event and his office was closed for business on December 9-10 because it was a weekend. (EX 20, p. 11). While Claimant testified that he did not ride his ATV in a reckless manner or in a way that aggravated his symptoms, after December 8, 2000, both Mr. Clinton and Mr. Hartsfield testified to the contrary. (EX 18, p. 64-71; EX 23, p. 25-26). Accordingly, based on the record as a whole, and the admissions of Claimant, his spouse and counsel, I find that Claimant does not make a credible witness.

C. Qualification of Claimant's Expert Witness Bryan Marquardt

An administrative law judge is not bound by the formal rules of evidence. 33 U.S.C. § 923(a) (2002); 29 C.F.R. § 18.1101(b)(2) (2002) (providing that the rules of evidence governing Longshore hearings before the ALJ do not apply with the exceptions of 18.403, 18.611(a), 18.614 and without prejudice to current practice). Under the Administrative Procedures Act, however, no order may be issued "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d) (2002). In *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993), the Supreme Court ruled that judges should not allow "junk science" into evidence. Such "junk science" does not constitute reliable or substantial evidence to support a decision. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L.Ed.2d 238 (1999). As to reliability, *Daubert*, 113 S. Ct. at 2796-97, listed four factors that a trial judge must consider concerning the theory or technique relied upon by the expert: (1) can it be tested, (2) has it been subjected to peer review and publication, (3) is there a known or potential rate of error, and (4) is it generally accepted in the scientific community? The standard is flexible, with focus resting on principles and methodology, not just the conclusions. *Id.* at 2797; *See also Carmichael*, 119 S. Ct. at 1176 (stating that the *Daubert* factors are even applicable to experience based testimony when they serve as reasonable measures of reliability). These factors are not exclusive and an ALJ has broad discretion to determine an expert's reliability based on the facts of the case. *Carmichael*, 119 S. Ct. at 1176; *General Electric Co. v. Jointer*, 522 U. S. 136, 142 118 S. Ct. 512, 517, 139 L.Ed.2d 508 (1997).

I do not find that Mr. Marquardt qualifies as an expert witness. Mr. Marquardt possesses no

special educational credentials related to mechanical/performance capabilities of ATVs, he has not published any articles regarding ATVs, he did not articulate any particular theory or explain any standards regarding the application of his "expert" opinion in relation to the facts of this case. Rather, Mr. Marquardt is familiar with ATVs in the sense that he sells and rides them on a daily basis. Mr. Marquardt never rode Claimant's ATV and never tested a similar make and model ATV on Claimant's property to ascertain its capabilities. Although Mr. Marquardt does not qualify as an expert, I accept his testimony for its limited probative value.

D. Notice of Claimant's January 4, 2001 Injury

Under 33 U.S.C. § 912(a) (2002), notice of an injury must be given by within thirty days after the injury, or, within thirty days of when the employee should have been aware of a relationship between the injury and the employment. Ordinarily, the date on which a claimant was told by a doctor that he had a work-related injury is the controlling date establishing awareness, and a claimant is required in the exercise of reasonable diligence to seek a professional diagnosis only when he has reason to believe that his condition would, or might, reduce his wage-earning capacity. *Osmundsen v. Todd Pacific Shipyard*, 755 F.2d 730, 732-33 (9th Cir. 1985), *on remand*, 18 BRBS 112, 114 (1986); *Lindsay v. Bethlehem Steel Corp.*, 18 BRBS 20, 22-23 (1986). The relevant inquiry is the date of awareness of the relationship among the injury, employment and disability. *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 585 (1st Cir. 1979); *Thorud v. Brady-Hamilton Stevedore Co.*, 18 BRBS 232, 235 (1986). Here it is undisputed that Claimant gave Employer notice of an alleged December 8, 2000 injury, and that the did not give "official" notice of a January 4, 2001 alleged injury.

The notice requirement serves to alert an employer of an impending suit, protect against fraudulent claims, and encourage prompt investigation. *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 691-92 (9th Cir. 1997). *See also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 613, 102 S. Ct. 1312, 1216-17, 71 L. Ed. 495 (1982)(stating that the notice requirement serves to appraise the employer of the allegations and helps to confine the issues to be tried and litigated). Under Section 12(d) there are three exceptions that excuse an untimely filed notice: when the employer has knowledge of the injury, when the employer is not prejudiced by the late filed notice, and when there are exigent circumstances that reasonably excuse the failure to give timely notice. 33 U.S.C. § 933(d) (2002).

D(1) Knowledge Under Section 12(d)(1)

Under Section 12(d)(1), a failure to give timely notice to the employer is excused when the employer has knowledge of the injury. 33 U.S.C. § 912(d)(1) (2002). Section 20(b) creates a presumption that, in the absence of substantial evidence to the contrary, employer had knowledge of the injury and was not prejudiced by claimant's failure to give notice. *Forlong v. American Securities & Trust Co.*, 21 BRBS 155, 159 (1988), citing *Stevenson v. Linens of the Week*, 688 F.2d 93 (D.C. Cir. 1982). Generally, for an employer to have knowledge of the injury, it must know of the injury

and its relationship to the employee's work. *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 972 (5th Cir. 1978); *Sun Shipbuilding & Dry Dock Co. v. Bowman*, 507 F.2d 146, 151 (3rd Cir. 1975). Such knowledge may be imputed to the employer when the employer knew that the employee suffered an injury and the surrounding facts and circumstances would lead a reasonable person to believe that the injury may be work related so that a further investigation is warranted. *Addison v. Ryan-Walsh Stevedoring Company*, 22 BRBS 32, 35 (1989); *Sheek v. General Dynamics Corp.*, 18 BRBS 1, 3 (1985), *on recons.*, 18 BRBS 151 (1986) (applying exceptions in Section 12(d) in the disjunctive). The Board has construed the Section 12(d)(1) exception in a narrow fashion. *Williams v. Nicole Enterprises, Inc.*, 19 BRBS 66, 71 (1986) (stating that mere knowledge of an accident at work does not equal actual knowledge of an injury giving rise to compensation liability that the employer would likely investigate); *Perkins v. Marine Terminals, Corp.*, 16 BRBS 84, 89 (1984). The time for "knowledge" within the meaning of Section 12(d)(1) refers to the same time period as for giving effective notice, i.e., within the thirty days provided for in Section 12(a). *Gardner v. Railco Multi Construction Co.*, 19 BRBS 238, 241 (1987), *vacated*, 902 F.2d 71 (D.C.Cir. 1990) (vacated on issue of coverage in relation to exposure or manifestation tests).

In the case of *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 974-75 (5th Cir. 1978) the Fifth Circuit overturned a ruling by the Board and reinstated a determination by the ALJ that the claimant did not provide timely notice under Section 12 and was barred from asserting a claim. The ALJ had "implicitly held that 'knowledge' of an illness within the meaning of subdivisions 912(d) and 930(f) refers to the knowledge of an illness which is or is (sic) claimed to be job related." *Id*. at 970. Weighing the evidence, the ALJ determined that employer's superintendent had knowledge that the claimant could not return to work, but held that the employer had no knowledge or notice of the occupational disease. *Id*. at 970-71. The Board had concluded that all Sections 912(d) and 930(f) required was that the employer know that the employee was leaving work due to an illness. *Id*. at 971. The Fifth Circuit determined that the Board erred inasmuch as it held that the employer need only be aware of the existence of an injury, and not be aware of its relationship to employment. *Id*. "Knowledge" simply referred to knowledge of a job related injury. *Id*. at 972. The court refused to impose a duty on the employer to conduct a further investigation when the employee merely informed the employer that he was ill, had seen a doctor, and could not return to work when neither the claimant nor his attorney made any mention that the injury was work related. *Id*. at 974.

In *Williams v. Nicole Enterprises, Inc.*, 19 BRBS 66, 73 (1986), the Board reversed a determination by the ALJ that an employer had knowledge notice under Section 12(d) to excuse a late filed notice. The claimant had injured his back in May 1978 by falling off a boom - he took two hours off work to rest - but resumed light duty employment for the rest of the day. *Id*. at 67. The claimant had sought medical treatment on October 20, 1978, at which time he became aware of the relationship between his injury, his employment and his disability. *Id*. at 71. Shortly thereafter, the claimant inquired of his employer if his insurance covered back problems and he gave his employer "official" notice of his injury on January 8, 1979. *Id*. The ALJ determined that a late notice was excused under Section 12(d)(1) because the employer had notice of the probability of injury on the day of the accident, and the claimant sought assistance from his employer after becoming aware of his problem. *Id*. The Board reversed, stating that the employer must have knowledge that the

claimants' injury was work related and have some reason to believe that compensation liability is possible. *Id*. "Mere knowledge of an accident at work does not equal actual knowledge of the likelihood of a compensable injury that the employer would likely investigate." *Id*. Although the claimant's accident was witnessed, it did not appear to be anything significant and it was unreasonable to impute knowledge to the employer on the day the accident occurred when the claimant did not have knowledge himself. *Id*. at 71-72. Furthermore, the claimants' conversation about insurance coverage gave no indication that his injury was work related. *Id*. at 72.

In this case, Claimant requested time off work on January 5, 2001, presented to the company physician, Dr. Satir, and related that he suffered a workplace accident on January 4, 2001, while lifting steel plates. (CX 3, p. 2). January 5, 2001, was a Friday, and when Claimant reported back to work on January 8, 2001, he presented his supervisor with a return to work slip to resume full duty. (EX 7, p. 1). Mr. Alfred, Employer's director of human resources, testified that he received Dr. Satir's medical report in the mail shortly after Claimant's visit. (EX 20, p. 14-15). Specifically, Dr. Satir's report stated: "Was lifting heavy plates and felt something - unable to sleep . . . DOI - 1-4-01." (CX 3, p. 2). The report also states that Claimant had tenderness of the sacroilliac joint, L5 muscle spasm, and a decreased range of motion. *Id*. Dr. Satir signed the report, provided Claimant's name, and provided Claimant's date of birth. *Id*. Unlike *Davis*, an occupational disease case, Employer had more than just a vague report of an injury without any other causative factors. Unlike *Davis*, Employer knew the nature of Claimant's injury - low back pain - and knew that Claimant was asserting to the company physician that his January 4, 2001 injury was work related. Claimant had left work at 11:30 a.m., on January 4, 2001, presumably due to his injury, and Employer subsequently completed an accident report on February 8, 2001, as relating to a December 8, 2000 workplace injury asserted by Claimant, which also put Employer on notice that Claimant had a suspect back that may have been re-injured or aggravated in January.

Unlike *Williams*, Employer had notice from Dr. Satir that Claimant suffered a workplace injury while lifting plates on January 4, 2001, and Dr. Satir's letter gave Employer knowledge of the nature and causative relationship of Claimant's injury. While Claimant returned to productive work on Monday, January 8, 2001, he did so after taking an early out on Friday, January 5, 2001, missing work on Saturday January 6, 2001, and resting on Sunday. (EX 5, p. 37). Claimant also left early on Thursday, January 11, and was absent from work on Saturday, January 13, 2001, and the following Monday and Tuesday. (EX 5, p. 37). Accordingly, I find that Dr. Satir's letter, issued within thirty days of when Claimant was aware or should have been aware of a relationship between his injury and his work, constitutes sufficient notice to Employer to satisfy the requirement of Section 12 because Employer consented to Claimant's request for medical treatment on January 5, 2001, the report detailed the exact problem for which Claimant now seeks to recover, its human resources manager received a written report detailing a specific injury on a specific day from its own physician, Claimant missed a significant amount of work following his doctor's visit.

D(2) Prejudice Under Section 12(d)(2)

Section 12(d)(2) provides that a failure to give a timely notice is excused when the Employer

is not prejudiced by the late notice. 33 U.S.C. § 912(d)(2) (2001). Employer must provide more than conclusory statements that it was prejudiced. *ITO Corp. v. Director, OWCP*, 883 F.2d 422, 424 (5th Cir. 1989). A mere allegation of difficulty is insufficient to establish prejudice, *Williams v. Nicole Enterprises*, 21 BRBS 164, 169 (1988), but actual post-notice investigation is not needed. *Kashuba v. Legion Insurance Co.*, 139 F.3d 1273, 1275 (9th Cir. 1997). Rather, an Employer can show prejudice by proving that it "has been unable to effectively investigate to determine the nature and extent of the alleged illness or to provide medical services. *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 972 (5th Cir. 1978). An employer, however, cannot reasonably expect notice of potential liability until the facts that make the employer potentially liable are ascertained. *ITO Corp.*, 883 F.2d at 424.

In *Kashuba*, 139 F.3d at 1276, the Ninth Circuit overturned an ALJ's decision, as not based on substantial evidence, and determined that the employer was prejudiced by late notice under Section 12(b). The claimant, Kashuba, did not notify his employer "until four months after the alleged injury and nearly six weeks after Kashuba had undergone back surgery." *Id*. The Ninth Circuit reasoned that Kashuba was not a credible witness since the ALJ had cited several inconsistencies in his testimony regarding the alleged injury and its treatment. *Id*. Also, the court reasoned that if the employer had received prompt notification, it could have conducted an "investigation to determine whether the accident had even occurred and its possible relationship to Kashuba's history of back problems, pointing out that Kashuba did not disclose his 1984 spinal injury on his employment application, a fact that would have magnified the need for prompt investigation." *Id*. Late notice deprived the employer from taking part in Kashuba's medical care, avoiding subsequent injuries, and avoiding surgery. *Id*. Furthermore, the employer should have had the opportunity "to get a second opinion before Kashuba underwent surgery or at least been informed before such a major procedure." *Id*. Accordingly, the employer was prejudiced because it was deprived from being able to produce "specific and comprehensive" evidence to sever the connection between Kashuba's injury and his employment. *Id*. (citing *Parsons Corp. v. Director OWCP*, 619 F.2d 38, 41 (9th Cir. 1980)).

In *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 689-90 (9th Cir. 1997), the Ninth Circuit held that the employer was not prejudiced by the claimant's, Taylor's, late filed notice. After thirty years as a longshoreman, Taylor filled an EMS accident report on October 15, 1989, reporting an excessive ringing in his ears. *Id*. at 686. At a pre-scheduled doctor's appointment on October 19, 1989, Taylor was diagnosed with "bilateral, descending sensorineural hearing impairment from mild to moderate." *Id*. On June 24, 1991, a second audiogram was conducted reaffirming the earlier results. *Id*. On July 1, 1991, the employer learned for the first time that Taylor's claim was for injuries sustained while at work. *Id*. At a formal hearing, the ALJ ruled that employer was not prejudiced by the late notice. *Id*. Specifically, the ALJ determined that employer still had ample time to conduct discovery and obtain sound surveys. *Id*. at 690. Additionally, the audiograms in the record indicated that Taylor's hearing loss had not worsened or changed in any way that would prevent employer from ascertaining the extent of Taylor's injury. *Id*. This rational was approved by the Ninth Circuit. *Id*.

In *Bolden v. Ingalls Shipbuilding, Inc.*, 33 BRBS 593, 599 (1999)(ALJ), the court denied

benefits finding that the employer was prejudiced. Specifically, the claimant had "received six months of medical treatment and underwent unsuccessful back surgery three months before Employer was made aware that Claimant was alleging his condition was work related." *Id*. Because of the late notice the employer was "denied the opportunity to obtain a second opinion "to assess the origin of the claimant's injury, its possible causes, and whether it was connected to the claimant's employment." *Id*.

Here, even if I had determined that Claimant failed to provide notice to Employer within thirty days of January 4, 2001, I find that Employer has not suffered any prejudice. Unlike *Bolden*, and *Kashuba*, Claimant has not underwent any significant medical treatment that would deprive Employer of the opportunity to obtain a second opinion, to assess the origin of the injury, its possible causes, or deprive Employer of the opportunity the to participate in the course of Claimant's medical treatment. Indeed, Employer has already conducted significant investigation and examination into Claimant's alleged January 4, 2001 workplace accident in connection with this litigation. Employer's counsel noticed the deposition of Employer's head of human resources, superintendent, one of Claimants' co-workers and one of Claimants' supervisors. (EX 20-23). Like the claimant in *Jones Stevedoring Co.*, Claimant's medical condition remains largely unchanged. Furthermore, Employer had information concerning the January 4, 2001 event from its own physician, but Mr. Alfred decided that no investigation was needed because Claimant had not followed the company policy that the employee must report his or her own accidents. (EX 20, p. 43-46). Accordingly, even if Dr. Satir's medical report did not qualify under the exceptions to the notice requirements in Section 12(d), Employer was not prejudiced by a late filed notice because Claimant's medical condition has not significantly changed, Employer has already investigated the January 4, 2001 accident through this litigation, and Employer had contemporaneous information relating that an accident had occurred from Dr. Satir, and to a lesser extent from Claimant, but Employer purposefully chose to ignore that information.

E. Filing of a Claim Under Section 13

Employer asserts that the alleged incident on January 4, 2001, is barred for consideration because Claimant failed to file a timely claim under the Act in relation to that event. Under Section 13 of the Act, a claim related to a traumatic injury must be filed within one year of the injury, but, this prescriptive period does not begin to run until the employee is aware, or should have been aware, of the relationship between the injury and the employment. 33 U.S.C. § 913(a) (2002). For occupational disease claims, an employee has two years once the employee is aware, or should have been aware, of a relationship between the employment, the disease and the disability. 33 U.S.C. § 912(b)(2) (2002). Failure to file a claim timely is not a bar to suit unless objection to such failure is made at the first hearing[4] in which all parties are given reasonable notice and an opportunity to be

[4] In its Notice of Controversion, dated June 14, 2001, Employer did not specifically raise Section 13 as a defense. (EX 3, p. 1). On the morning of the formal haring, however, Employer's counsel learned for the first time that Claimant may try to claim a second accident on January 4, 2001, and Employer timely objected in open court that the claim was not timely under

heard. 33 U.S.C. § 913(b)(1) (2002). Timeliness of a claim is presumed under Section 20(b), and the burden to show untimeliness is on the employer. *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117 (5th Cir. 1981); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140, 143 (1989). Furthermore, the time period for filing a claim under Section 13 is tolled under Section 30(f) whenever an employer has notice or knowledge of an injury and fails to file a report under Section 30(a) to the Secretary detailing the facts of the injury. 33 U.S.C. § 930(a) (f) (2002). Section 13 serves a purpose of repose that Section 12 does not in that Section 13 settles financial disputes within a specified period of time. *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 691-92 (9th Cir. 1997).

In this case, Claimant filed his claim for compensation under the Act on May 15, 2001. (CX 1, p. 1). Claimant related that he suffered a workplace accident on December 8, 2000 while carrying a heavy welding machine. *Id*. Employer controverted the claim for compensation on June 14, 2001 on the grounds that there were no compensation or medical benefits owed under the Act. (EX 3, p. 1). In Claimant's November 16, 2001 pre-hearing statement, he again asserted that the claim arose when he was carrying heavy equipment and injured his back. To circumvent the Section 13 requirements, Claimant argues that the January 4, 2001 incident was a mere aggravation of his December 8, 2000 lifting injury and the January 4, 2001 incident forms part of the same claim as the December 8, 2000 accident.

In *U.S. Industries Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 102 S. Ct. 1312, 71 L.Ed.2d 495 (1982), the majority of the Supreme Court determined that a injured employee's entitlement to compensation should be denied on the alternative grounds that he did not submit a claim for the particular injury and that the injury was not caused by his employment within the meaning of the Act. While at home on November 20, 1975, the claimant, Riley, awoke with severe pains, later attributed to an arthritic condition, and a pain that Riley attributed to a lifting accident at work the day before. *Id*. at 1314-15. Riley's claim for compensation under Section 13 provided that he suffered an injury on November 19, 1975, and the claim never mentioned that an injury occurred at home on November 20, 1975, and that the injury was "employment bred." *Id*. at 1317. The majority of the Supreme Court likened a claim under Section 13 to pleadings in other litigations contexts, reasoning that a claim serves to give the other party notice of the allegations and confined the issues to be tried. *Id*. at 1316-17. Reasoning that the contents of a claim were not specified in Section 13, the Court looked to the notice provision of Section 12 in opining that a claim under Section 13 should include a statement of the "time, place, nature and cause of the injury." *Id*. at 1316. Even if Riley's claim that he suffered a workplace accident on November 19 sufficed to state a *prima facie* case invoking the presumptions of Section 20, the Court held that the ALJ "was not required to address and the employer to rebut every conceivable theory of recovery." *Id*. at 1317. The court further noted that a wide variance was allowed between pleading and proof "but if the variance is so great that the defendant is prejudiced by having to deal at the hearing with an injury

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Section 13. (Tr. 40). Accordingly, I find that Employer timely raise the issue that Claimant's suit was not timely filed.

entirely different from the one pleaded, the variance may be held fatal." *Id* at n.7, quoting Larson, THE LAW OF WORKMEN'S COMPENSATION § 78.11, p. 15-13-14 (1976).

Contrary to Employer's argument, it was not "bushwacked" by Claimant's assertion of both a December 8, 2000 and a January 4, 2001 workplace injury. As discussed, *supra*, Part D(1), Employer had knowledge of Claimant's alleged January 4, 2001 workplace injury, and knew that Claimant had timely filed a claim under the Act on May 15, 2001 relating to a low back injury of the same nature as Claimant reported to Dr. Satir on January 4, 2001.

Title 20, Part 702 of the Code of Federal Regulations provide for the procedures used in the administration of the Act. Section 336 specifically provides the procedures for an ALJ to follow whenever new issues arise at the formal hearing that were not properly addressed by the district director. 29 C.F.R. § 702.336 (2002). That section states:

> If, during the course of the formal hearing, the evidence presented warrants consideration of an issue or issues not previously considered, the hearing may be expanded to include the new issue. If in the opinion of the administrative law judge the new issue requires additional time for preparation, the parties shall be given a reasonable time within which to prepare for it, If the new issue arises from evidence that has not been considered by the district director, and such evidence is likely to resolve the case without the need for a formal hearing, the administrative law judge may remand the case to the district director for his or her evaluation and recommendation pursuant to § 702.316.

29 C.F.R. § 702.336(a) (2002).

At the formal hearing, Claimant's attorney asserted that Claimant suffered a second accident on January 4, 2001, but in his claim for compensation Claimant only alleged a low back injury in respect to a December 8, 2000 workplace accident. Employer had Claimant's medical reports form Dr. Satir and the events of January 4, 2001 were litigated in depth by the parties. The parties scrutinized the medical records and examined witnesses regarding the alleged events of that day. I do not find that the issue requires any additional time for preparation and find not reason to remand the issue back to the district director for consideration because a claim for compensation relating to the events on January 4, 2001, is not likely to have any bearing on the parties ability to resolve their differences. Unlike *U.S. Industries Sheet Metal, Inc.*, finding that Claimant asserted a claim for events on January 4, 2001 does not require Employer to "rebut every conceivable theory of recovery." Rather, any variance between Claimant's actual claim for compensation and the one he asserted in open court is minimal because both alleged events involve are of the same physical nature and any investigation in to Claimant's alleged December 8, 2000 accident and the resulting nature and extent of that injury necessarily encompasses his alleged subsequent injury on January 4, 2001.

Furthermore, I note that under *Jones Stevedoring Co.*, Section 13 serves a purpose of repose so that an employee will not be called to litigate an action that is stale. In this case the purpose of

Section 13 is not furthered because Employer had notice of Claimant's January 4, 2001 accident, and had conducted extensive discovery in to the incident while defending the timely filed claim relating to an injury on December 8, 2000. Accordingly, I find it appropriate to consider Claimants' January 4, 2001 incident as a claim for compensation under the Act because the issue was litigated by the parties, Employer had notice within the time allowed for filing a Section 13 claim that Claimant allegedly suffered a January 4, 2001 injury at work, Claimant had filed a timely claim for an injury of the exact same nature that related to a December 8, 2000 injury, and I have the authority to address new issue raised by the parties not specifically addressed by the district director.[5]

F. Causation

(1) *Prima Facie* Case

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2) (2001). Section 20(a) of the Act provides a presumption that aids the claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary - -
> (a) That the claim comes within the provisions of this chapter.

33 U.S.C. § 920(a) (2001).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. "[T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983)(stating that a claimant must allege injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990)(finding the mere existence of an injury is insufficient to shift the

[5] Finding that Claimant's claim for compensation in regards to the January 4, 2001 incident is properly before me, I find no need to address Claimant's argument that the July 4, 2001 incident was merely a continuance or a flare up of the timely asserted December 8, 2000 injury to the same physical location in Claimant's low back.

burden of proof to the employer). Once both elements of the *prima facie* case are established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d 287-88.

(1)(a) Existence of Physical Harm or Pain

In order to show harm or injury a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152 (2nd Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307 (D.C.Cir. 1968); *Southern Stevedoring Corp. v. Henderson*, 175 F.2d. 863 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event, or episode and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. *Schoener v. Sun Shipbuilding and Dry Dock Co.*, 8 BRBS 630 (1978). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998)(pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995)(pre-existing back injuries). Here it is undisputed that Claimant suffers a physical injury because Claimant has bulging discs at L4-5 and L5-S1.

(1)(b) Establishing that an Accident Occurred in the Course of Employment, or that Conditions Existed at Work, Which Could Have Caused the Harm or Pain

Although a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm, a claimant must show the existence of working conditions that could conceivably caused the harm alleged harm beyond a "mere fancy or wisp of 'what might have been.'" *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 379 (4th Cir. 1994) (finding the harm related to the claimant's work based on his credible testimony and the medical evidence); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980)(same). On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or that conditions existed at work that could have caused the harm. *Bonin v. Thames Valley Steel Corp.*, 173 F.3d 843 (2nd Cir. 1999) (unpub.) (upholding ALJ ruling that Claimant did not produce credible evidence that a condition existed at work which could have cause his depression); *Alley v. Julius Garfinckel & Co.*, 3 BRBS 212, 214-15 (1976)(finding the claimant's uncorroborated testimony on causation not worthy of belief); *Smith v. Cooper Stevedoring Co.*, 17 BRBS 721, 727 (1985) (ALJ) (finding that the claimant failed to meet the second prong of establishing a *prima facie* case because the claimant's uncorroborated testimony linking the harm to his work was not supported by the record).

For a traumatic injury case, the claimant must show a specific traumatic event, more than just working conditions that required repetitive bending, stooping, climbing, or crawling. *Leblanc v. Cooper/T. Stevedoring, Inc.*, 130 F.3d 157, 160-61 (5th Cir. 1997) (finding that back injuries due to repetitive lifting, bending and climbing ladders are not peculiar to employment and are treated as

traumatic injuries); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 177-78 (2nd Cir. 1989) (finding that a knee injury due to repetitive bending stooping, squatting and climbing is not an occupational disease). Conditions that are due to congenital and degenerative factors do not constitute a compensable injury. *Lennon v,. Waterfront Transport*, 20 F.3d 658, 663 (5th Cir. 1994) (degenerative disc disease); *Director v. Bethlehem Steel Corp.*, 620 F.2d 60, 64-65 (5th Cir. 1980) (degenerative lumbar disc disease). Thus, a claimant's failure to show an antecedent event will prohibit the claimant from establishing a *prima facie* case and his entitlement to the Section 20 presumption of causation.

In *Bolden v. G.A.T.X. Terminals, Corp.*, 30 BRBS 71, 72-73 (1996), the Board affirmed a denial of benefits when the ALJ determined that the claimant was not a credible witness and negated the claimant's contentions that he suffered a work related accident. Specifically, the claimant related his injury to a specific traumatic event, but the ALJ noted: 1) the claimant was confused over the date of the incident; 2) a physician remarked that the claimant had experienced pain two weeks prior to the alleged accident; 3) neither the claimant nor his physician related the pain to the claimant's work during, or soon after the alleged event occurred; and 4) the claimant failed to report the injury to his employer promptly. *Id*. at 72. Similarly, the ALJ discredited the testimony of the claimant's co-workers and wife because their statements concerning the claimant's physical condition did not establish the date of the alleged traumatic event. *Id*. Finally, the ALJ noted that no physician, outside of those who took the claimant's version of events at face value, could establish that a specific event cause the claimant's injuries. *Id*. at 72-73. Accordingly, the claimant in *Bolden* failed to establish the second prong of the *prima facie* case because he failed to establish that a traumatic event, or conditions that existed at work, could have caused his harm. *Id*. at 73.

Here, I found that Claimant did not make a credible witness. As such, more is required than Claimant's mere assertion that he was injured at work to establish a *prima facie* case. Similar to *Bolden* Claimant often seemed confused over the date of the alleged injury and the specific events on the particular day that caused the injury. Claimant produced no person who witnessed the alleged accidents. Two physicians reported that Claimant suffered an injury prior to the two claims that form the basis of this action. The physician administering the MRI reported Claimant suffered an injury sometime in September 2000, and Dr. King related an injury that occurred in May 2000, prior to Claimant's date of re-hire by Employer. There is absolutely no medical evidence that Claimant had suffered a workplace accident on December 8, 2000. On February 8, 2001, Claimant reported to his supervisors that he had suffered an accident on December 8, 2000, and he never mentioned a January 4, 2001 incident. Employer's February 8, 2001 accident report, as well as every physician's report was based solely on what Claimant had related.

Claimant's work attendance records do not support a finding that Claimant was injured on December 8, 2000, and while Claimant missed a significant amount of time after January 4, 2001,

there is no indication that absenteeism was a deviation from his "pre-injury" work history.[6] Claimant's wife testified that Claimant came home in pain on December 8, 2000 and January 4, 2001, but I give little weight to such statements from a spouse who did not witness an event and whose testimony is not supported by the record. Finally, Dr. Thorpe assessed Claimant's back injury as degenerative, and while it was possible to have a traumatic injury that caused his degenerative condition between December 8, 2000 and Claimant's February 15, 2001 MRI, Dr. Thorpe stated that such a progression was not common. Accordingly, I find it appropriate to DENY benefits under the Act because Claimant has not established a *prima facie* case that he was injured at work or that conditions existed at work that could have cause his harm or pain.[7]

G. Conclusion

I find that Claimant is not a credible witness. Although I find that Employer had notice of an alleged January 4, 2001 workplace injury, and that a claim for that injury was properly presented before me, I find that Claimant failed to produce any evidence beyond his uncorroborated testimony that an event occurred or conditions existed at work that could have caused his bulging discs.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, Claimant's suit for benefits under the Act is DENIED.

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CLEMENT J. KENNINGTON
Administrative Law Judge

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[6] On January 25, 1999, September 26, 2000, and April 23, 2001, Claimant received a warning or disciplinary statement concerning excessive absenteeism. (EX 5, p. 34-36).

[7] Even if Claimant had established a *prima facie* case for compensation, these same facts present substantial evidence to rebut the presumption of causation and based on the record as a whole, Claimant would not be able to establish by a preponderance of the evidence that he was injured at work.